Supreme Court, U. S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

JAMES L. STEVENS and TRANS WORLD AIRLINES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by holding that a discharged employee is entitled to *de novo* judicial consideration of the propriety of his discharge notwithstanding the existence of a collective bargaining agreement which provides for an exclusive, final and binding arbitral remedy, and despite the fact that the employee unsuccessfully exercised that remedy.

2. Whether the Court of Appeals erred in holding that common law tort or contract principles, inconsistent with federal labor law, could be applied to determine the propriety of an employee's discharge pursuant to a union security clause.*

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* All parties to the proceeding in the District of Columbia Court of Appeals are listed in the caption of the case in this Court. Trans World Airlines, Inc., a defendant below, is listed as a respondent pursuant to Rule 19.6.

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals is reported at 413 A.2d 1305 and is appended as an Appendix to this petition (1a, *et seq*).

JURISDICTION

The decision of the District of Columbia Court of Appeals was entered on April 18, 1980. A timely petition for rehearing *en banc* was denied June 18, 1980 (10a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The time for filing this Petition was extended to and until October 6, 1980 by Mr. Justice Brennan.

STATUTES INVOLVED

This case involves Section 2 Eleventh (a) of the Railway Labor Act, 45 U.S.C. 152 Eleventh (a) which provides as follows:

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

STATEMENT OF THE CASE

In this suit grounded on common law tort and contract theories, Plaintiff Stevens complained of his discharge as an airline pilot by Trans World Airlines (TWA) at the behest of Petitioner Air Line Pilots Association (ALPA) for refusal to make timely payments of com-

pulsory service charges to ALPA as required by the collective bargaining agreement governing his employment. On motions to dismiss and for summary judgment by TWA and ALPA, judgment adverse to Stevens was entered in the Superior Court of the District of Columbia March 23, 1979. On Stevens' appeal, the judgment of the Superior Court was reversed and the matter remanded for further proceedings.

The collective bargaining agreement between TWA and ALPA includes a union security provision requiring all employees covered thereby to make timely payments to ALPA of dues or compulsory service charges as a condition of continuing employment with TWA. The Railway Labor Act, 45 U.S.C. 152 Eleventh, sanctions such provisions and upholds discharge of employees, like Stevens, who fail to make timely payment as required.

Pursuant to the employment agreement, Stevens' discharge was stayed pending arbitration under the contract protest procedure. Stevens was employed by TWA in January, 1966, joined ALPA in January 1967 and paid membership dues continuously until March 3, 1976. As recited by the Court of Appeals, he then resigned from ALPA membership and refused to pay service charges required by the bargaining agreement between ALPA and TWA to be paid by non-member pilots as a condition of continuing employment. ALPA warned Stevens that his failure to pay could result in discharge from his job under the collective bargaining agreement. When Stevens still refused to pay, ALPA requested TWA to discharge Stevens pursuant to the agreement. Thereafter, TWA on October 11, 1976, notified Stevens that unless he paid ALPA the accumulated service charges by November 1, 1976, TWA would discharge him as of that date.

The ALPA-TWA Agreement governing Stevens' employment set forth mandatory review procedures provid-

ing for final and binding resolution of disputes regarding union security discharges.[1] Under the review proce-

[1] Pertinent provisions of the grievance procedure are as follows:

* * * *

(D) Protest Procedure

A protest by a pilot whose discharge is requested by the Association as a result of an interpretation or application of Section 3-B *shall be limited to the following procedure*:

(1) A pilot who believes that the provisions of Section 3-B have not been properly interpreted or applied, as they pertain to him, may submit his request for review in writing within five (5) days from the date of receipt of notice by him in the form of his copy of notice to the Company with respect to him as provided in Paragraph (C). Such request must be submitted to the Staff Vice President—Labor Relations of the Company or his successor or designee who will review the protest and render a decision in writing with respect thereto not later than five (5) days following the receipt of the request of review.

(2) *The Staff Vice President—Labor Relations of the Company or his successor or designee, shall forward his decision to the pilot with a copy to the official of the Association who shall promptly be designated in writing by the Association for this purpose. Said decision shall be final and binding on all interested parties unless appealed as hereinafter provided.* If the decision is not satisfactory to either the pilot or the Treasurer of the Association, either may appeal the decision by notice of appeal sent, within ten (10) days of the mailing of the decision, to the other party and to the above mentioned Company official, directly to a neutral referee. Such referee may be agreed upon by the Company and the Association within the ten (10) day period herein specified. Either the Company or the Association may request the National Mediation Board to name such referee.

(3) *The decision of the neutral referee shall be requested within thirty (30) days after hearing with respect to the protest unless otherwise agreed by the Com-*

dure, the aggrieved employee appeals first to a TWA reviewing officer, the Staff Vice President—Labor Relations. If unsatisfied with the reviewing officer's decision, he may appeal to a neutral referee selected by the National Mediation Board. Under the contract, effectuation of a union security discharge is stayed pending decision of the neutral referee. The Agreement provides that the decision of the reviewing office, unless appealed to a referee, is final and binding on all parties; the Agreement further provides that, if an appeal is taken, the decision of the referee is similarly final and binding.

Upon being notified by TWA that his discharge would be effective November 1, 1976, Stevens invoked the review procedures by appealing to the TWA reviewing officer. The reviewing officer ruled that ALPA could require payment of the service charge and that discharge would be appropriate if Stevens did not pay by November 1, 1976. Stevens then appealed to a neutral referee and, at his request, effectuation of the discharge was stayed pending the referee's decision. In August 1977, the referee ruled that by refusing to pay the service charge, Stevens had violated the Agreement and that his discharge was therefore proper. Subsequent to the neutral referee's decision holding that his discharge was proper, Stevens on September 2, 1977 offered to pay his accumulated service charges thereby attempting to retain his position as a pilot. On September 8, however, TWA notified Stevens that he would be discharged, effective September 9, 1977 based on the arbitration decision.

> *pany and the Association and shall be final and binding on all parties to the dispute.* The fees, charges and other reasonable expenses of such neutral referee shall be borne equally by the Company and the Association.
>
> * * * *

(Emphasis added).

On receiving the letter of discharge, Stevens again sought relief under the contract review procedure. As recited by the Court of Appeals, he again wrote the TWA reviewing officer. Seeking review of his discharge, Stevens pointed out that during the course of the protest and arbitration proceedings, ALPA had sent him monthly computerized notices of the balance of his accumulated service charges. The last such notice, dated September 1, 1977, indicated a "minimum balance due" of $924.88, with a "due date" of September 25, 1977. At the bottom appeared the words:

> "Payment of minimum will correct your bad standing condition."

These words, Stevens argued in his letter to the reviewing officer, had led him to believe that he could, at any time before September 25, 1977, pay the minimum balance due, thereby recover "good standing" with ALPA, and avoid discharge by TWA. As acknowledged by the Court of Appeals, the reviewing officer again concluded that the discharge had been proper. Stevens admittedly sought no further review by a neutral referee as authorized by the contract grievance procedure nor did he request that effectuation of the discharge be stayed pending review proceedings. Instead, Stevens brought suit several months later against TWA and ALPA in the Superior Court of the District of Columbia, alleging common law tort and breach of contract theories.

On Motions of TWA and ALPA for dismissal and summary judgment, the Superior Court entered judgment adverse to Stevens March 23, 1979.[2] The Court of Appeals reversed and remanded for further proceedings,

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[2] Stevens failed to submit opposing affidavits, an opposing statement of facts assertedly in dispute, as required by Superior Court Rule 12-I(K), or otherwise to respond to the summary judgment motion; the Superior Court judge consequently took the facts as being not genuinely in dispute.

holding that Stevens' complaint regarding his union security discharge was not, regardless of the mandatory and all-encompassing terms of the union security discharge review procedure, governed *exclusively* by the contract review procedure. The Court of Appeals reasoned that Stevens' lawsuit presented a claim of "estoppel"; that even though this claim "arises out of a dispute over discharge for failure to pay a service charge" it "is distinct from that initial discharge dispute"; and therefore:

> "[a]lthough the ALPA-TWA Agreement governed the dispute over whether the union could require appellant to pay the service charge, *the Agreement . . . does not provide the exclusive remedy for appellant's 'estoppel' claim.*" (Emphasis added) (6a).[3]

The federal questions presented by this Petition for Writ of Certiorari were initially raised by Petitioner and Trans World Airlines in the Superior Court for the District of Columbia in their Motions to Dismiss and for Summary Judgment. These same federal questions

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[3] The Court of Appeals also rejected ALPA's contention that summary judgment had been proper under Superior Court Rule 56 (which is identical to F.R.C.P. 56) based on Stevens' failure to raise his reliance upon ALPA's computerized notice as a genuine issue of fact through opposing affidavits and his failure to submit any statement of facts assertedly in dispute as required by Superior Court Rule 12-I(K), *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-90 (1968) (party seeking to resist entry of summary judgment must demonstrate genuine issue of material fact through affidavits and may not simply rest on pleadings). While this misapplication of local procedural rules itself does not merit review here, we suggest it should be considered in connection with the other lengths to which the Court of Appeals went to allow Stevens to pursue a *de novo* judicial challenge to his discharge which, as stated below, included an end-run around the final grievance resolution and a whole-cloth inference that Stevens' complaint was not exclusively subject to arbitration despite the contract terms and invocation by Stevens of the grievance procedure.

were briefed and argued before the District of Columbia Court of Appeals and were the subject of the Petition for Rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION ALLOWING PLAINTIFF TO RELITIGATE MATTER DETERMINED ADVERSELY TO HIM UNDER A COLLECTIVE BARGAINING AGREEMENT GRIEVANCE PROCEDURE VIOLATES THE PRINCIPLE OF ARBITRAL FINALITY AND THE PRESUMPTION OF ARBITRABILITY ESTABLISHED BY NUMEROUS DECISIONS OF THIS COURT.

As set forth above, the propriety of Stevens' union security discharge for refusal to make timely payment of compulsory service charges was upheld in the neutral referee's decision which the parties' labor agreement provides is final and binding. Additionally, as set forth above, the precise claim which the Court of Appeals held Stevens could pursue *de novo* through litigation—that ALPA was estopped by the terms of its computerized notice from exercising its right under the collective bargaining agreement to request Stevens' discharge—was itself advanced by Stevens in the contract review procedure. This precise complaint was presented to and considered by the TWA reviewing officer and was rejected in his decision which is itself final and binding under the labor agreement where, as was the case here, no request for a neutral referee's review is made.

Throughout the proceedings below, Petitioner insisted that allowing Stevens to pursue through litigation a *de novo* challenge to his union security discharge would violate the finality principle established by *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). That principle has had even more longstanding recognition by this Court in cases under

the Railway Labor Act than under LMRA. Long prior to the Steelworkers Trilogy, this Court stated in *Brotherhood of Railroad Trainmen* v. *Toledo, P., & W.R.R.*, 321 U.S. 50, 58 (1944), that the "policy of the Railway Labor Act was to encourage use of the nonjudicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes." Thereafter in *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601 (1959), this Court held that a common law action paralleling Stevens' was precluded by the final and binding decision of the National Railroad Adjustment Board. And in *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 325 (1972), this Court held that the awards of Boards established for the resolution of disputes pursuant to the Railway Labor Act are "impeachable" only to the extent provided by federal law and that a party "who has litigated an issue" before such a board "may not relitigate that issue in an independent judicial proceeding."

The Court of Appeals in this case could not but acknowledge that Stevens' "estoppel" claim had been presented to the TWA reviewing officer pursuant to the parties' agreement and was rejected by him.[4] Its decision is simply irreconcilable with the principle of arbitral finality which this Court has held essential to the advancement of arbitration in the labor field.

Review by this Court is particularly essential to vindication of federal labor policy because the Court of Appeals reached the result it did by a back-door route which others may be tempted to follow. Without mention of decisions by this Court establishing the principle of arbitral finality, the Court of Appeals held that the grievance procedure in the parties' agreement—regard-

[4] The Court of Appeals' reference generally to the contract review procedure failed specifically to acknowledge the provision therein according finality to the ruling of the TWA review officer in instances where a neutral referee's review is not sought.

less of its terms—did "not provide the *exclusive* remedy for [Stevens'] 'estoppel' claim". (Emphasis added). The Court of Appeals avoided the finality of the reviewing officer's decision by declaring that Stevens' complaint, though advanced under the contract grievance procedure, was not arbitrable thereunder or at least not exclusively so. Without an iota of support from the contract language, the Court of Appeals stretched to infer an exception to the grievance procedure. In so doing, it violated an entire host of decisions of this Court.

In *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960), disapproving refusal of a lower court to compel arbitration based on its view that the particular grievance was frivolous, this Court declared that "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all* disputes that arise under the agreement" and admonished that "*no exception*[*s*] . . . *should be read into the grievance clause*. . . ." 363 U.S. at 567. (Emphasis added). Indeed, this Court declared that an earlier state decision to the contrary had "announced a principle that could only have a crippling effect on grievance arbitration." 363 U.S. at 566-67.[5] Similarly, in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), disapproving refusal of a lower court to compel arbitration where the grievance procedure excluded from arbitration "matters . . . strictly a function of management", this Court declared that apart from matters which the parties "*specifically* exclude, *all* of the questions on which the parties disagree *must* . . .

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[5] The Court was referring disapprovingly to *International Association of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S. 2d 317 (1947), *aff'd* 297 N.Y. 519, 74 N.E. 2d 464 (1947). The decision by the Court of Appeals inferring an exception to the exclusivity of the contract grievance procedure would have the very same "crippling effect" on grievance arbitration and just as much calls for repudiation by this Court.

come within the scope of the grievance and arbitration provisions of the collective agreement." 363 U.S. at 581. (Emphasis added). The Court declared that "[d]oubts should be resolved in favor of coverage" lest the "arbitration clause . . . be swallowed up by the exception . . . ." 363 U.S. at 583-84.[6]

In ensuing decisions after the Trilogy, this Court has taken pains to guard against incursions upon negotiated grievance procedures. In *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 370 U.S. 254 (1962), the Court held subject to arbitration an employer's claim for damages arising from an illegal strike and rejected the employer's argument that an exception to the exclusive application of the grievance procedure should be inferred based on the Union's conduct of an illegal strike. In a holding that applies equally here, the Court declared that "[a]rbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract . . . ." 370 U.S. 262. There is no more suggestion here than there of any breach by the defendants of the arbitration provisions. Like the employer's illegal strike claim in *Drake Bakeries*, Stevens' estoppel claim

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[6] The particular grievance in *Warrior & Gulf Navigation Co.* involved contracting out of work. In rejecting the contention that such a grievance should be excluded from arbitration as being strictly a management function, the Court declared that grievances involving contracting out work were "grist in the mills of arbitrators" and referred to an arbitration decision citing 64 published decisions involving the contracting out of work, 363 U.S. at 584, n.8. Grievances involving issues of estoppel are equally the grist of arbitration. The leading primer on arbitration, Elkouri & Elkouri, *How Arbitration Works* (Bureau of National Affairs 1973), includes a section titled "Waiver and Estoppel", pp. 349-51, citing a host of arbitration decisions involving issues of estoppel and declaring estoppel claims to be frequent in the arbitration context. The Court of Appeals' inference of an exception to the grievance procedure for estoppel claims is simply oblivious to day to day labor arbitration practices in which such claims are commonplace.

simply does not justify any judicially-inferred exception to the contract grievance procedure.

Most clearly inconsistent with the Court of Appeals' inferred exception to exclusivity of the contract grievance procedure is *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), where the Court held that an employee who had not exhausted grievance remedies could not maintain a common law breach of contract suit for severance pay. The Court declared the general federal rule that employees wishing to assert contract grievances "must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." 379 U.S. at 652. The Court stated:

> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. . . *If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'*" 379 U.S. at 653. (Emphasis added).

Notably, the Court disapproved the suggestion "that individual employees, unlike either the union or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit." 379 U.S. at 659. Just as the plaintiff in *Maddox* was barred from litigating his claim having failed to assert it in the contract grievance procedure, Stevens must be barred from pursuing a judicial suit having failed to pursue his complaint to the conclusion of the grievance procedure and in the face of a resolution at the first step which the contract provides is final and binding if not challenged by appeal within the grievance procedure. Precisely as in *Maddox*, if the grievance procedure here "cannot be made exclusive" it loses its desirability as a method of settlement.

Finally in *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368 (1974), this Court held that the federal pro-arbitration policy evinced by the Steelworkers Trilogy barred recognition of an exception to the grievance procedure even for safety disputes involving danger to life and limb. It held that the presumption of arbitrability of such disputes supported the entry of back-to-work injunctions in vindication of arbitration procedures.

In this case, the Court of Appeals has erected a presumption of non-arbitrability for an as yet undefined class of disputes which undermines the exclusivity and finality, and hence the effectiveness, of the labor arbitration mechanism. The threat posed by such a doctrine to effectuation of federal pro-arbitration policy is substantially heightened in that the decision arises from a jurisdiction where numerous national unions are headquartered.

As indicated by footnotes 1 and 2 of its decision, the Court of Appeals thought its result supported by several decisions of this court allowing union members to "litigate several types of common law claims in state and federal courts." (5a). The Court of Appeals' reliance upon those decisions, however, stems from a confusion between two distinct labor law principles. The cases cited by the Court of Appeals involve exceptions to the principle that subject matter governed by the Labor-Management Relations Act is governed by the pre-emptive application of federal law and is subject to the exclusive jurisdiction of the National Labor Relations Board, *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959).[7] The cases cited by the Court of Ap-

[7] The Railway Labor Act sets up no agency with exclusive jurisdiction paralleling that of the NLRB. Nevertheless, disputes governed by the Railway Labor Act—though litigable in state and federal courts—are subject to pre-emptive application of federal law

peals in footnote 2 are exceptions to the rule of federal law pre-emption and exclusive jurisdiction of the NLRB for claims asserting intentional infliction of emotional distress, unlawful fines, and malicious libel. None of those cases suggests any exception to the totally distinct pro-arbitration principle upholding the finality of dispute resolutions reached through a contractually final and binding grievance procedure. Similarly, the Court of Appeals' citation of *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 299 (1971), indicates only that a claimed breach of the duty of fair representation may be asserted in state or federal court independent of the generally exclusive jurisdiction of the NLRB over disputes under LMRA.[8]

The Court of Appeals' confusion may stem from the fact that this case involves both a final arbitral resolution and subject matter exclusively governed by the Railway Labor Act. Hence, it involves both the pro-arbitration principle of arbitral finality and the LMRA-RLA principle of federal pre-emption. By confusing the two, the Court of Appeals misapplied cases involving exceptions to the pre-emption rule as a basis for inferring an exception to the parties' all-encompassing grievance procedure. Its consequent refusal to honor the contract provision that grievance resolutions would be final and binding fully warrants this Court's review. Since the Court of Appeals' decision so plainly violates federal labor principles and policy, we suggest the appropriateness of summary reversal *per curiam*.

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just as those under the LMRA, *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 390 (1969).

[8] Notably, this Court held Lockridge's suit precluded by exclusive jurisdiction of the NLRB because no duty of fair representation claim had ever been suggested, 403 U.S. at 299, which is also the case here.

II. BY ALLOWING STEVENS TO PURSUE A JUDICIAL CHALLENGE TO HIS DISCHARGE FOR FAILING TO PAY COMPULSORY UNION SERVICE CHARGES, THE COURT OF APPEALS FAILED TO RECOGNIZE THAT THE SUBJECT MATTER OF THIS ACTION IS GOVERNED EXCLUSIVELY BY FEDERAL LAW.

The entry of summary judgment in this case by the Superior Court was correct for two reasons: First, as discussed above, Stevens' complaint, including his claim of estoppel, was resolved against him pursuant to a final and binding grievance procedure which the contract provides is the exclusive remedy for all union security discharge complaints. Second, the subject matter of the dispute—the propriety of a union security discharge—is one which is governed exclusively by federal law which upholds Stevens' discharge as proper.

The provision in the parties' agreement calling for discharge of employees who do not make timely payment of compulsory dues and service charges is specifically sanctioned by the Railway Labor Act, Section 2, Eleventh, 45 U.S.C. 152, Eleventh. Stevens' invocation of common law tort and contract theories to challenge his union security discharge is inconsistent with Congress' action in subjecting such matters of labor relations in the railway and airline industries to the exclusive governance of the Railway Labor Act. This Court has many times disapproved application of state law principles to subject matter governed by the Railway Labor Act, *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969); *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 691-2 (1963), as well as the Labor-Management Relations Act, *Garmon, supra*; *Lockridge, supra.* In *Jacksonville Terminal Co.*, this Court cited "paramount federal policies of nationwide import" as limiting application of state law to matters

governed by the Railway Labor Act and declared cases under LMRA ensuing from *Garmon* to be highly persuasive in determining the scope of federal pre-emption, 394 U.S. at 381-84. In *Lockridge, supra,* an LMRA case seeking—like this one—to challenge a union security discharge under common law principles, this Court held the subject matter governed exclusively by federal law and disapproved the lower court's application of state law principles. It characterized the issue raised by the challenge to a union security discharge as:

> "*one of the clearest instances* where the *Garmon* principle, properly understood, should operate to oust state court jurisdiction." *Lockridge, supra,* 403 U.S. at 293 (Emphasis added).[9]

This case, involving a union security discharge just as did *Lockridge,* necessarily calls for "construction of the applicable union security clause, a matter as to which . . . federal concern is pervasive and its regulation complex", 403 U.S. at 296.

The federal authorities which must govern disposition of this action establish the legality of Plaintiff's discharge beyond peradventure. Numerous decisions have upheld union security discharges under the Railway Labor Act against attacks similar to that here, *Hostetler* v. *Bhd. of Railroad Trainmen,* 287 F.2d 457 (C.A. 4, 1961); *Sams* v. *Bhd. of Ry. & Steamship Clerks,* 233 F.2d 263 (C.A. 4, 1956); *Shiels* v. *Baltimore & Ohio R. Co.,* 254 F.2d 863 (C.A. 7, 1958), *aff'g* 154 F.Supp. 917 (S.D. Ind. 1957); *McNamar* v. *Baltimore & Ohio Chicago Terminal,* 254 F.2d 717 (C.A. 7, 1958), *aff'g* 153 F.Supp. 835

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[9] Here, as in *Jacksonville Terminal Co.,* and other cases governed by RLA rather than LMRA, the state court, though not ousted of jurisdiction, see *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra,* 394 U.S. at 390, is precluded from applying state common law inconsistent with overriding provisions of federal statutory law.

(N.D. Ind. 1957); *La France* v. *Bhd. of Locomotive Firemen & Enginemen*, 204 F.Supp. 13 (E.D. Mich. 1962) (and cases cited therein). In each instance, union security discharges have been upheld as consistent with the union security provisions of Section 2, Eleventh of RLA and contract provisions requiring continuous membership in a qualifying union. This is so even though, in several instances, the individual plaintiffs—after the union certified their delinquencies and demanded their discharges—corrected their bad standing by rejoining the union and paying their dues. In that respect, those cases are virtually on all fours with this one.

The contention rejected in *McNamar* and *Shiels*—that tardy acquisition of union membership immunized the particular employees from discharge—is the same as the theory advanced by Plaintiff here that his discharge could somehow have been prevented by a tender of his compulsory service charges following the Arbitrator's decision.[10]

Here, as in *Shiels* and *McNamar*, the basis for discharge became complete when the union initially certified Plaintiff's delinquency. While ALPA continued to bill Plaintiff monthly for services rendered by it to him during the period his discharge was stayed and those notices stated that payment would correct Plaintiff's bad standing, they in no way stated that his restoration to good standing in ALPA would somehow retroactively undo his discharge from employment by TWA. As set forth above,

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[10] *McNamar* and *Shiels*—decided under RLA—are to the same effect as LMRA decisions holding it settled that "an employee who fails to tender his fees within the required period cannot by a tardy attempt to meet his contractual obligation forestall his discharge. . . . [I]t perverts the legislative mandate to enlarge the scope of protection afforded employees . . . [and] would prejudice the orderly and efficient administration of the internal affairs of unions." *NLRB* v. *Technicolor Motion Pic. Corp.*, 248 F.2d 348, 351-4 (C.A. 9, 1957); *Int'l Assn. of Machinists* v. *NLRB*, 247 F.2d 414, 420 (C.A. 2, 1957).

he had been personally and expressly notified that persistence by him in remaining delinquent beyond November 1, 1976 would lead to his discharge. That Plaintiff himself understood that his discharge as of November 1, 1976 was stayed only pending arbitration is plain from his own letter invoking that procedure:

> "Please advise me immediately by telegram letter that I am to continue as an employee *until the appeal is decided* and that I will not be terminated on November 1, 1976." (Exhibit Q to Stipulation appended as Exhibit 1 to ALPA's Motion to Dismiss).

Such authorities as *Shiels* and *McNamar* squarely foreclose Plaintiff's claim that after the arbitration decision against him he could undo his discharge by tardily curing his bad standing.

The Court of Appeals' determination that Stevens could litigate his discharge under state law collides squarely with the Court's decision in *Lockridge* and a host of decisions by the circuit courts that federal law exclusively governs union security discharges in the railway and airline industries. Summary reversal is clearly warranted for this reason alone.

CONCLUSION

The Court of Appeals' decision allowing Stevens to pursue on common law grounds a *de novo* judicial challenge to his union security discharge, defying both the federal pro-arbitration policy and the doctrine of federal labor law pre-emption, amply warrants this Court's review. Since the Court of Appeals' decision quite plainly violates this Court's prior decisions, we suggest this Court summarily reject the Court of Appeals' decision through reversal *per curiam*.

Respectfully submitted,

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APPENDIX

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 79-448

JAMES L. STEVENS,
Appellant,

v.

AIRLINE PILOTS ASSOCIATION INTERNATIONAL AND TRANS WORLD AIRLINES, INC.,
Appellees.

Appeal from the Superior Court of the District of Columbia

(Argued February 13, 1980 Decided April 18, 1980)

Ronald A. Flate, with whom *Charles A. Kubinski* was on the brief for appellant. *Robert L. Susnow* also entered an appearance for appellant.

Daniel B. Edelman for appellee Airline Pilots Association International.

Edmund E. Harvey for appellee Trans World Airlines, Inc.

Before KERN, HARRIS and MACK, *Associate Judges.*

KERN, *Associate Judge*: Appellant seeks reversal of the trial court's orders of dismissal of his complaint and summary judgment entered against him in a suit he brought against appellees for reinstatement as a pilot for Trans World Airlines (TWA). For reasons enumerated below, we reverse the trial court's orders and remand the case for further proceedings.

I. FACTS

In 1976 appellant refused to pay a "union service charge" required by the Airline Pilots Association International (ALPA) to be paid by non-members of that union who are employed as airline pilots. ALPA warned appellant that failure to pay could result in discharge from his job under the agency shop agreement between ALPA and Trans World Airlines, Inc. (the ALPA-TWA Agreement). When appellant still refused to pay, ALPA recommended to TWA that it discharge appellant. Accordingly, TWA on October 11, 1976, notified appellant that unless he paid ALPA the accumulated service charges by November 1, 1976, TWA would discharge him as of that date.

Appellant then invoked the review procedures established by § 3-B(D) of the ALPA-TWA Agreement, to contest the authority of ALPA to require payment of the service charge. Appellant first appealed to the appropriate TWA officer (Staff Vice President for Labor Relations), as provided in § 3-B(D)(1) of the Agreement. The TWA officer ruled that ALPA could require payment of the service charge and that discharge would be appropriate if appellant did not pay the service charge by November 1. Appellant then appealed to a "neutral referee," as provided in § 3-B(D)(2) of the Agreement. At appellant's request, discharge was stayed pending the referee's decision. In August 1977 the referee ruled that by refusing to pay the service charge, appellant had violated the ALPA-TWA Agreement and that his discharge was therefore proper.

Unsuccessful in his attempts to show that ALPA lacked authority to require a service charge and to force his discharge for non-payment, appellant on September 2, 1977, offered to pay ALPA the accumulated service charges and thereby retain his position as pilot. On Sep-

tember 8, however, TWA notified appellant that he would be discharged, effective September 9, 1977.

On receiving this letter of discharge, appellant again sought relief under § 3-B of the ALPA-TWA Agreement. He wrote the appropriate TWA officer, seeking review of TWA's discharge of appellant. In seeking reinstatement in his position, appellant pointed out that during the course of all the protest and arbitration regarding the service charge, ALPA had sent appellant monthly computerized notices of the balance of accumulated service charges appellant owed ALPA. The last such notice, dated September 1, 1977 (after the referee's final decision), indicated a "minimum balance due" of $924.88, with a "due date" of September 25, 1977. At the bottom of this (and all other such notices ALPA had sent appellant) appeared the words "PAYMENT OF MINIMUM WILL CORRECT YOUR BAD STANDING CONDITION." These words, appellant argued in his letter to the reviewing TWA officer, had led appellant to believe that he could, at any time before the last "due date," pay the minimum balance due and thereby recover "good standing" with ALPA and avoid the discharge by TWA.

The reviewing TWA officer, apparently unconvinced by this argument, again concluded that the discharge had been proper. Appellant then brought suit against TWA and ALPA in Superior Court, alleging, *inter alia*, breach of contract. ALPA and TWA both filed motions to dismiss for failure to state a claim. The trial court granted these motions in September 1978 but vacated the dismissal in November of that year on appellant's motion. Hearing on the motions to dismiss, and on appellee ALPA's later motion for summary judgment, was set for March 23, 1979. On that date the trial court granted all three motions. Shortly thereafter appellant noted his appeal from the dismissal of his case against both TWA and ALPA and from the summary judgment entered in favor of ALPA.

II. The Appeal From the Summary Judgment

In contending that the trial court erred in entering summary judgment in favor of ALPA, appellant argues principally that his "estoppel" claim raised a genuine issue as to a material fact. According to appellant, that "estoppel" claim—appearing in the third count of appellant's complaint (Record at 7), and presented to the trial court at the March 1979 hearing (Supp. Record at 5-8)—raised a genuine issue as to whether he relied on (and if so whether he was reasonable in relying on) the legend appearing at the bottom of the bills ALPA sent him, monthly, as being a binding promise that ALPA would restore him to good standing both with the union and with TWA anytime appellant paid the "minimum balance due" before the "due date."

Appellee ALPA contests both the relevance and the persuasiveness of appellant's argument. In urging affirmance of the trial court's entry of summary judgment in its favor, ALPA argues (a) that appellant is precluded from attacking the summary judgment because he failed to respond to ALPA's motion for summary judgment by setting forth specific facts showing a genuine issue, as required by Super. Ct. Civ. R. 56(e); (b) that even aside from this procedural bar, the summary judgment was proper because there were indeed no facts in dispute; and (c) that appellant seeks to apply common law theories to a dispute which, according to federal law, is governed exclusively by the terms of the ALPA-TWA Agreement.

We find none of ALPA's arguments persuasive. We discuss below our reasons for concluding (1) that appellant's "estoppel" claim falls outside the bounds of the ALPA-TWA Agreement and therefore may properly be argued in the Superior Court, and (2) that in pleading

that "estoppel" claim appellant properly presented a genuine issue as to a material fact.

1. *The "estoppel" claim before the Superior Court was not improper.*

ALPA cites, among others, the case of *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971), as support for the proposition that union disputes over discharge for failure to pay dues or fees are governed exclusively by federal law—in this particular case by the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1972)—which in turn sanctions labor agreement provisions for dispute settlement. Accordingly, ALPA asserts, appellant may not properly plead a common law theory of "estoppel" in view of the ALPA-TWA Agreement extant in this case.

We note, however, that *Lockridge* stands also for another proposition: that, regardless of otherwise applicable preemption considerations, state courts may entertain a union member's suit for his union's breach of its duty of fair representation.[1] Other Supreme Court cases have likewise declared that, despite the broad applicability federal law confers upon labor agreements, union members may litigate several types of common law claims in state and federal courts.[2] We find appellant's claim

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[1] *Motor Coach Employees v. Lockridge, supra* at 299, *citing Vaca v. Sipes*, 386 U.S. 171 (1967). *See also Lewis v. Greyhound Lines-East*, 181 U.S.App.D.C. 116, 555 F.2d 1053, *cert. denied*, 434 U.S. 997 (1977).

[2] *See, e.g., Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290 (1977) (whether union and employer committed tort of intentional infliction of emotional distress against union member); *N.L.R.B. v. Boeing Co.*, 412 U.S. 67 (1973) (whether fines imposed by union on some members are unlawful under state contract law); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (whether union committed tort of malicious libel against union member).

in the present case similar to the claims that such Supreme Court decisions have allowed state courts to entertain. Although his "estoppel" claim—that ALPA made a promise on which he relied, reasonably, to his detriment—arises out of a dispute over discharge for failure to pay a service charge, the "estoppel" claim is distinct from that initial discharge dispute. Therefore, although the ALPA-TWA Agreement governed the dispute over whether the union could require appellant to pay the service charge, the Agreement in our view does not provide the exclusive remedy for appellant's "estoppel" claim.

2. *Appellant properly presented to the Superior Court a genuine issue as to a material fact.*

ALPA argues that both procedural and substantive grounds support the trial court's entry of summary judgment in its favor. Specifically, ALPA claims (1) that appellant failed to comply with the requirement of Super. Ct. Civ. R. 56(e) that a party opposing a summary judgment motion respond to that motion by setting forth facts showing a genuine issue for trial, and (2) that even aside from this procedural bar, summary judgment was proper because no genuine issue existed. We reject both of these claims.

Rule 56(e) provides in pertinent part:[3]

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[3] ALPA also argues that Super. Ct. Civ. R. 12-I(k) establishes procedural requirements which appellant failed to meet. Rule 12-I(k) provides in pertinent part:

> [T]here shall be served and filed with each motion for summary judgment pursuant to Rule 56 a statement of the material facts as to which the moving party contends there is no genuine issue. Any party opposing such a motion may, within ten days after service of the motion upon him, serve and file a concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. In determining any motion for summary

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations and denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

Stressing the Rule's requirement of a written response to a summary judgment motion, ALPA asks this court to affirm on this procedural ground. However, Rule 56(e) implicitly recognizes that there are situations in which no defense will be required by a party opposing a summary judgment motion. The closing sentence of that subsection provides that if the opposing party does not respond to the motion, "summary judgment, *if appropriate*, shall be entered against him." (Emphasis supplied.) Further, the Advisory Committee Notes to the corresponding federal rule observe that "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." [4]

We conclude that summary judgment was inappropriate in the present case, despite appellant's apparent failure to file a written response to the summary judg-

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> judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion.

In the circumstances of this appeal, Rule 12-I(k) seems to require no more than does Rule 56(e). Thus we focus our discussion on the latter Rule.

[4] *See generally* 10 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE 716-17 (1973); 31 F.R.D. 647, 648 (1962).

ment motion, because ALPA did not establish in its motion the absence of a genuine issue. In so concluding, we note both (i) that material facts in support of a summary judgment motion must be viewed in a light most favorable to the opposing party, with all inferences drawn in its favor,[5] and (ii) that a trial court should be cautious in granting a motion for summary judgment when resolution of the issues requires a determination of state of mind.[6] ALPA's Statement of Facts Not in Genuine Dispute, filed with its summary judgment motion, stipulated that ALPA had sent appellant notices indicating that payment of the "minimum balance due" would correct his bad standing condition. Thus, that statement of facts in no way contradicted or explained away the allegations in appellant's original complaint that ALPA had induced him to rely to his detriment on ALPA's promises of good standing on payment of the minimum balance. Indeed, when viewed in a light most favorable to appellant, ALPA's statement of facts would support such a complaint by appellant. This observation, coupled with the fact that an issue central to appellant's "estoppel" theory of recovery was his subjective response to the legend appearing on ALPA's computerized notices, persuades us that appellant's failure to file affidavits as contemplated by Rule 56(e) did not justify the trial court's entry of summary judgment against him.

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[5] *See Yasuna v. Miller*, D.C.App., 399 A.2d 68, 71 (1979); *International Underwriters, Inc. v. Boyle*, D.C.App., 365 A.2d 779, 782 (1976); *Burch v. Amsterdam Corp.*, D.C.App., 366 A.2d 1079, 1081 n.1 (1976); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE 527-28 (1973).

[6] *See* 10 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE 582-87 (1973).

III. The Appeal From the Dismissal.[7]

We further conclude that the trial court erred in granting the motions to dismiss appellant's complaint against TWA and ALPA for failure to state a claim upon which relief may be granted. For the reasons we have stated above that led to our conclusion that summary judgment was improper in this case, we are persuaded that the dismissal for failure to state a claim was also improper.

Reversed and remanded
for further proceedings.

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[7] As noted above, the orders appealed from in this case include not only the entry of summary judgment for ALPA, discussed above, but also the dismissal of the cases against both TWA and ALPA for failure to state a claim on which relief can be granted. *See* Super. Ct. Civ. R. 12(b). Neither the record nor the parties explain this rather unusual combination of orders. Appellant does not specifically address the merits of the two dismissals, focusing instead on the entry of summary judgment. However, since summary judgment was entered only for ALPA, we must consider the propriety of the trial court's dismissal of appellant's case against TWA.

DISTRICT OF COLUMBIA
COURT OF APPEALS

CA 5758-78

[Filed June 18, 1980, Hugh E. Kline, Acting Clerk]

No. 79-448

J. L. STEVENS,

Appellant,

v.

AIRLINE PILOTS ASSOCIATION, ET AL.,

Appellees.

Before: Newman, Chief Judge, Kelly, Kern,* Gallagher, Nebeker, Harris,* Mack,* Ferren and Pryor, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, and it appearing that no judge has called for a vote on the petition, it is

ORDERED appellant's petition for rehearing is hereby denied. It is

FURTHER ORDERED the petition for rehearing en banc is denied.

PER CURIAM.

(* denotes merits division.)

No. 80-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

JAMES L. STEVENS and TRANS WORLD AIRLINES, INC.,
Respondents.

On Writ of Certiorari to the District of Columbia Court of Appeals

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

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IN THE

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OCTOBER TERM, 1980

No. 80-516

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

This supplemental brief is filed pursuant to Rule 22.6 of the Rules of this Court.

Since the filing of the Petition for Writ of Certiorari in this matter October 1, 1980, the Court on October 13, 1980 granted certiorari in *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, No. 79-2006. Petitioner suggests the disposition of *Barrentine* is likely to bear on the present Petition.

In *Barrentine*, the Court will review the decision of the United States Court of Appeals for the Eighth Cir-

cuit that an employee's prior submission of his contractual claim for wages for hours worked to a grievance committee, as required by his collective bargaining agreement, foreclosed federal court review of a subsequent claim under the minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(b). Here the District of Columbia Court of Appeals held that a discharged employee is entitled, through a suit based on common law tort and contract principles, to *de novo* judicial consideration of the propriety of his discharge notwithstanding the existence of a collective bargaining agreement which provides for an exclusive, final and binding arbitral remedy, and despite the fact that the employee unsuccessfully exercised that remedy.

If the decision of the Eighth Circuit that the arbitral resolution foreclosed Petitioners' independent federal statutory FLSA action is upheld, it will follow *a fortiori* that the Court of Appeals erred in according plaintiff here *de novo* judicial consideration of a claim based, not on an independent federal statute, but on common law tort and contract principles.[1]

On the other hand, if the Eighth Circuit's decision is reversed, it appears likely that the Court will allow *de novo* judicial consideration based on the rationale of *Alexander* v. *Gardner-Denver*, 415 U.S. 36 (1974), only to the extent that Petitioners present claims under an independent federal statute. In *Gardner-Denver*, *supra*, the Court made plain, that, except for causes of action such as those under Title VII based on independent federal statutory rights, the general federal policy favoring

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[1] Indeed, the argument for preclusion of a *de novo* suit is stronger here since, as set forth in the Petition, p. 6, the precise subject matter of plaintiff's suit was presented and rejected under the contract grievance procedure, whereas in *Barrentine*, Petitioners' FLSA claim was not presented under the grievance procedure.

final disposition of labor disputes through arbitration—and barring *de novo* judicial consideration of the same subject matter—would nevertheless prevail, 415 U.S. at 46, fn. 6. In effect, the decision of the Court of Appeals in this case extends the *Gardner-Denver* exception to arbitral finality to an as yet undefined class of claims based not on independent federal statutory rights but on local common law. Such claims present, at most, "minimal policy interests", *Union de Tronquistas* v. *Flagship Corp.*, 554 F.2d 8, 11 (C.A. 1, 1977) (arbitral interpretation of state regulation regarding computation of annual and sick leave was final and binding arbitral resolution). In the event the decision of the Eighth Circuit is reversed, we suggest that this Court will disapprove the decision of the Court of Appeals here as expanding inappropriately upon the circumstances under which *de novo* judicial consideration is available following conclusion of a final and binding grievance procedure.

CONCLUSION

While we continue to believe the Court of Appeals' decision warrants summary reversal *per curiam*, we suggest that the Court may wish to withhold disposition pending a decision in *Barrentine*.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-516

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

JAMES L. STEVENS AND TRANS WORLD AIRLINES, INC.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI DISTRICT OF COLUMBIA COURT OF APPEALS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether an employee may be denied the opportunity to demonstrate in the Superior Court that a union's arbitrary conduct and bad-faith disavowance of its promises to him subverted the arbitral process.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-516

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

JAMES L. STEVENS AND TRANS WORLD AIRLINES, INC.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI DISTRICT OF COLUMBIA COURT OF APPEALS

COUNTERSTATEMENT OF THE CASE

In accordance with his personal convictions Respondent JAMES L. STEVENS, hereinafter "Stevens," who was employed by Respondent TRANS WORLD AIRLINES, hereinafter "TWA," resigned his membership in the AIR LINE PILOTS ASSOCIATION (Petitioner herein and hereinafter referred to as "ALPA") on March 3, 1976.

Pursuant to the agency shop agreement between TWA and ALPA, union membership was not a condition of employment provided that a non-member employee paid a periodic service charge to ALPA.

Respondent Stevens objected to the compulsory service charge and accordingly withheld payment.

Stevens thereupon began receiving billing statements from ALPA which set forth the amount of accruing delinquencies in service charge payments and which stated very clearly that "payment of minimum will correct your bad standing condition." Stevens received a similar statement each month thereafter through September of 1977 when he was wrongfully discharged. Moreover each successive billing he received from ALPA for payment of the service charge included the incremental increase over the previous billing. Stevens, as a reasonable person, interpreted the above quoted language to mean that by paying the "minimum" the matter of bad standing could be rectified.

On October 11, 1976 TWA notified Stevens that he would be discharged on November 1, 1976 unless he paid the accrued compulsory service charges. Stevens chose to contest the service charge provisions via the protest procedure set forth in the relevant collective bargaining agreement, more particularly, Section 3-B(D) of same (see Petitioner's brief at page 4). He requested that TWA confirm in writing that it would not discharge him during the arbitration proceeding. The arbitration occurred on June 19, 1977. From October of 1976 through July of 1977, Stevens received monthly billings from ALPA stating that payment would correct his bad standing.

The sole issue submitted for arbitration was whether TWA could condition employment upon payment of the compulsory service charge, notwithstanding Stevens' stated philosophical objections.

Respondent Stevens has maintained throughout the travels and travails of this lawsuit, from the District of Columbia Superior Court to this bench, that he legitimately believed that at any time he could resolve the matter completely by merely forwarding a check for the amount due to ALPA. He legitimately felt that should he lose the arbitration, he could pay his service charges and go back to business as usual.

Stevens believed that TWA was pursuing his discharge solely because it was required to do so under the labor-management agreement. He also believed that ALPA only wanted payment of the delinquent service charges, not his discharge. Once he brought his account current ALPA would be satisfied. *He believed this because Petitioner advised him so repeatedly in writing.*

The arbitrator's award held that Stevens' "discharge was proper," treating it as an accomplished fact. Stevens immediately sought clarification of the award to provide that though TWA had the authority to discharge Stevens, the discharge was subject to a grace period during which he could tender payment of the delinquent assessments.

The arbitrator refused to modify or clarify the award stating that such a modification was beyond his authority since the issue of time to pay was not before him. Respondent Stevens again stresses that there was no doubt in his mind that he could reinstate himself by paying the arrearages.

On September 1, 1977, following the publication of the arbitrator's decision, Stevens received another billing from ALPA which again stated that payment would correct his bad standing condition. That bill clearly indicated that Stevens had until September 25, 1977 to make payment. Respondent Stevens was nevertheless terminated on September 9, 1977. He then immediately

tendered full payment by check and said check was cashed by ALPA.

Petitioner contends that the legend appearing on the monthly bills means that payment of the outstanding balance would restore Stevens' good standing in the association, but would not restore his job. Respondent Stevens submits that a reasonable person could construe the statement as meaning what ALPA says it means, but Stevens also submits that a reasonable person could just as easily, indeed could more easily, interpret the words the way Stevens interpreted them. Indeed, experience in all facets of personal and commercial life supports the embrasive view that one can always quiet the hounds by paying one's dues!

ALPA now says that the issue of whether Stevens should have been kept in the employ of TWA after he paid the overdue service charges, was already determined adversely to Stevens via the protest procedure. Section 3-B(E) of the protest procedure of the collective bargaining agreement provides that:

> "During the period in which a protest is being handled under the provisions of Section 3-B and until final decision by the Staff Vice President — Labor Relations, or his successor or designee, or the neutral referee, the pilot shall not be discharged from the company nor lose any seniority or any other rights under the agreement solely for reason of non-compliance with the terms and provisions of Section 3-B." Section 3-B(E) of agreement at page 14.

Stevens' status as an employee must remain inviolate during the course of the protest procedure.

Notwithstanding the fact that Stevens had moved for a clarification of the award on September 2, 1977 (Ex 5 of

Complaint), and notwithstanding the fact that Stevens' status as an employee must remain inviolate during the course of the protest procedure, TWA discharged him effective September 9, 1977.

On September 12, 1977, Stevens initiated what ALPA has described as a second protest procedure at a time when Stevens had already been terminated in violation of the express provisions of the agreement. While ALPA has maintained that Stevens invoked a second protest procedure which he failed to take to completion, ALPA has acknowledged in none of its papers, that since Stevens was discharged on September 9, 1977 he was barred from invoking the protest procedure of Section 3-B(D) of the Agency agreement, because that applied to a "pilot whose discharge is requested." Stevens was already discharged.

Respondent Stevens then brought suit against TWA and ALPA in Superior Court, alleging, inter alia, breach of contract. ALPA and TWA both filed motions to dismiss for failure to state a claim. The trial court granted these motions in September 1978 but vacated the dismissal in November of that year on Stevens' motion. Hearing on the motions to dismiss and on ALPA's later motion for summary judgment was set for March 23, 1979. On that date the trial court granted all three motions. Shortly thereafter Stevens noted his appeal from the dismissal of his case against both TWA and ALPA and from the summary judgment entered in favor of ALPA.

The Court of Appeals concluded that the trial court erred in granting the motions to dismiss Stevens' complaint against TWA and ALPA for failure to state a claim upon which relief may be granted. Summary judgment was also held improper.

ARGUMENT

STATE COURTS MAY ENTERTAIN ACTIONS INVOLVING THE VOLUNTARY ACTS OF A UNION WHICH HAVE TAINTED THE ARBITRAL PROCESS.

Petitioner seeks a disposition of this matter in a fashion that would nullify a long established federal policy regarding jurisdiction and arbitration of labor disputes. By granting Petitioner's writ this court would necessarily have to find as outdated the words of caution contained in *San Diego Building and Trades Council v. Garmon* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Petitioner asks this court to grant it a right which unions have been repeatedly denied — the right to prejudice the rights of an employee by its own conduct by subverting the arbitration process, and then to assert that that very same arbitration process is a bar to judicial relief for the employee. This court has never granted a union such cavalier authority.

The *Garmon* principal is simply that: "Where exercise of state power over a particular area of activity threatens interference with a clearly indicated policy of industrial relations, it is judicially necessary to preclude the states from acting." [*Garmon, supra* at 243.]

The *Garmon* court sought to prevent "conflict between power asserted by Congress and requirements imposed by state law." [*Garmon, supra* at 344.] It carefully prescribed a doctrine that would allow an unimpeded implementation of federal labor policy without limiting the legitimate interests of states in protecting their citizens. "Due regard for the presuppositions of our embracing federal system, including the principal of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy has not required us to find withdrawal from the states of the power to regulate where the activity regulated was merely a peripheral concern of

the Labor Management Act.' [*Garmon, supra* at 243, 244.]

Moreover, in *Motor Coach Employees v. Lockridge* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), the court reiterated its unwillingness to "declare pre-empted all local regulation that touches or concerns in any way the complete interrelationships between employees, employers, and unions." *Lockridge, supra* at 403 U.S. 289, 91 S.Ct. 1919.

The court has steadfastly maintained a position of "balanced inquiry" into the federal and state interests attendant to each situation. *Farmer v. United Brotherhood of Carpenters,* 97 S.Ct. 1056, 430 U.S. 290, 300 51 L.Ed. 338 (1976). In *Lockridge,* where plaintiff's claim concerned the construction of and interpretation of a union security provision similar to the one at bar, preemption was held to apply, while in *International Association of Machinists v. Marcos Gonzales,* 356 U.S. 617, (1958), the federal interests were "tangible and remote." *Lockridge, supra* at U.S. 296.

In the case at bar a union's own bureaucratic machinery operated so as to mislead a member to his own substantial detriment. Respondent Stevens has yet to see, and ALPA's petition fails to provide, even the remotest clue in the puzzle of how federal interests of paramount national importance will be advanced by denying Stevens the right and opportunity to maintain the common law theory of estoppel as a bar to his discharge. By the same token, respondent Stevens cannot fathom a more basic state interest than the right of a citizen to pursue his chosen means of maintaining a livelihood. Moreover, this court has concluded that such complaints should be "construed to avoid dismissals." *Czosek v. O'Mara,* 397 U.S. 25, 27, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970).

This court has long held unions to a duty of fair representation in their dealings with employers. *Vaca v. Sipes,* 386 U.S. 171, 81 S.Ct. 903 (1966). This requires a union to treat concerned employees "without hostility or discrimination . . . to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca, supra* at 386 U.S. 171. The pre-emption doctrine was held inoperable in regard to the duty of fair representation which stands "as a bulwark to prevent arbitrary union conduct toward individuals." *Vaca, supra* at 386 U.S. 182. As correctly noted by the Court of Appeals below, *Lockridge* expressly holds that state courts may entertain suits alleging unfair representation by a union [Petitioner's appendix at page 5a]. *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 299.

Thus this court has been careful to ensure that judicial remedies exist for the individual employees. This Respondent contends that the conduct of Petitioner ALPA in continually promising this Respondent that he could correct his bad standing condition, while intending to discharge him, regardless of payment, falls far below even the basest standard of good faith and is, quite literally, grossly arbitrary.

This court has stressed that an employee may not be kept out of court by a party asserting either the preemption doctrine or arbitral finality when it is the very conduct of that party which provoked the complaint of injustice. The *Vaca* court stated:

> "Because these contractual remedies have been devised and are often controlled by the union, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite

his failure to secure relief through the contractual remedial procedures. *Vaca, supra* at 386 U.S. 171, 185.

An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by a contract occurs when the conduct of the employer amounts to a repudiation of those contract procedures. *Drake Bakeries, Inc. v. Local 50, Am. Bakery, etc., Workers,* 370 U.S. 254, 260-263, 82 S. Ct. 1346, 1350-1352, 8 L.Ed.2d 474 (1962). In such situation the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

After having induced Stevens' discharge while the arbitral process was in motion, ALPA, in contravention of the union contract, cannot now be heard to require adherence to the contrct as an exclusive remedy. It is simply estopped by its own conduct from doing so.

Respondent Stevens notes that Petitioner finds considerable significance in this Respondent's second invocation of the protest procedure on September 12, 1977. ALPA does not and will not lend recognition to the fact that the alleged second protest was necessitated by Petitioner's own inconsistent and arbitrary conduct and promises. Because of the September 12, 1977 letter, Petitioner continues to insist that the second issue has been arbitrated and that considerations respecting pro-arbitral finality foreclose state court remedies. Respondent Stevens cannot agree.

This court has already laid to rest the contention that arbitral finality forecloses inquiry into union conduct attendant to the arbitration. *Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554, 96 S.Ct. 1048. There, a union failed to adequately and agressively represent members

who had been discharged for alleged dishonesty. The matter was fully arbitrated and the discharges sustained. The union members then filed suit claiming that their union had violated its duty of fair representation by acting arbitrarily as well as in bad faith by taking inadequate steps to ascertain the truth and present a defense. The union unsuccessfully argued that the arbitration was final and binding as required by the labor management agreement.

While the court has often acknowledged the proarbitration policy considerations specified in *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), it also has said, in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562, 563, 96 S.Ct. 1048, with respect to that policy, that:

> "(I)t is urged that when the procedures have been followed and a decision favorable to the employer announced, the employer must be protected from relitigation by the express contractual provision declaring a decision to be final and binding. We disagree. The Union's duty relieves the employee of an expressed or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract." *Hines, supra* at 424 U.S. 554, 567.

A binding arbitration was reviewable when tainted by breach of duty on the part of a union. *Hines, supra* at 424 U.S. 554, 568.

In the case at bar, Respondent Stevens was led to believe, and thus pursued the arbitration of a principle, with the understanding that should he lose that arbitration,

he could still cure his bad standing condition by paying back charges which the arbitration award would say he was required to pay. This understanding was created by ALPA's affirmative statements. In reliance thereon Stevens withheld payment until he had his claim arbitrated. After the arbitration Stevens learned, in contradiction to the apparent meaning of ALPA's frequent express statements, that he was to be terminated without an opportunity to cure his bad standing. Stevens was discharged while asserting the inequity and bad faith and lack of fair dealing which came to the fore. The entire arbitral process was, at the very least, tainted. Even if the meaning of ALPA's billing statement is deemed ambiguous, ALPA is the author of the ambiguity and ought to be estopped from denying the reasonable interpretation of Respondent Stevens.

Having subverted the arbitral process, ALPA cannot now be heard to proclaim arbitral finality as a bar to Stevens' cause. That would be a unique doctrine requiring reversal of a long tradition of this bar.

Lastly, Petitioner, via supplemental memorandum, asks that this writ be granted, or at least forestalled, on the coattails of *Barrantine v. Arkansas-Best Freight Systems, Inc.*, No. 79-2006.

Petitioner is making another attempt to direct a reviewing court's attention away from the facts of the case at bar. The *Barrantine* case pattern is quite distinguishable from the fact pattern in this matter. Here, the union mislead Respondent Stevens and, based upon common law theories of tort and contract, it should be estopped from profiting thereby. In *Barrantine*, the issue revolves around an employee's second attempt to have a hearing on the wages due him. Neither discharge, bad faith, or estoppel are the issues.

Contrary to Petitioner's statement that the Court of Appeals carved out an undefined exception, Stevens submits that the Court merely upheld this Court's principle that a union's affirmative acts in tainting the arbitral process can give rise to the right to judicial relief.

CONCLUSION

The District of Columbia Court of Appeals decision allows Stevens an opportunity to prove that ALPA's statement induced reliance to his substantial detriment, at once tainting the arbitral process and challenging common law tort and contract rights and theories. This Court has sanctioned this remedy, it satisfies all substantial interests and it requires no further review.

Respectfully submitted,

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LAW OFFICES OF RONALD A. FLATE
Counsel for Respondents

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on December 1, 1980, I served the within *Response to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

United States Court of Appeals
District of Columbia Judicial Circuit
500 Indiana Avenue N.W.
Washington, D.C. 20001

United States District Court for the
District of Columbia
for John Garrett Penn, Judge
United States Courthouse
Washington, D.C. 20001

Daniel B. Edelman
Yablonski, Both & Edelman
1140 Connecticut Avenue N.W.
Suite 800
Washington, D.C. 20036

Edmund E. Harvey
1612 K Street N.W.
Washington D.C.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 1, 1980 at Santa Monica, California.

Suzanne Newman
(Original signed)

Supreme Court, U. S.
FILED
DEC 9 1980
MICHAEL RODAK, JR., CLERK

No. 80-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

JAMES L. STEVENS and TRANS WORLD AIRLINES, INC.,
Respondents.

On Writ of Certiorari to the District of Columbia Court of Appeals

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REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

This Reply Brief is principally necessitated by Respondent's reliance, for the first time, upon *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and his assertion that Petitioner's conduct subverted the contract grievance procedure so as to remove the finality of the resolution of his grievance concerning his union security discharge. (Response, 6, 9-11). At issue here is whether the Court of Appeals erred by holding that a discharged employee is entitled to *de novo* judicial consideration of the propriety of his discharge notwithstanding the existence of a labor contract which provides for an exclusive, final and binding arbitral remedy, and despite the fact that the employee unsuccessfully exercised that remedy. Prior to the filing of the Response, Respondent had never suggested—nor did the Court of

Appeals—that ALPA had subverted the grievance procedure. Rather, the Court of Appeals observed that Respondent's suit sought to pursue an "estoppel" claim distinct from his initial objections to discharge for nonpayment of ALPA service charges and held, without explanation, that the contract grievance procedure did "not provide the exclusive remedy" for such a claim (Petition, 6a).

Contrary to the suggestion implicit in the Court of Appeals' opinion, issues of estoppel are frequently presented and resolved in labor arbitration (Petition, 11, fn. 6). The Court of Appeals' holding that such claims are nonarbitrable is contrary to a host of decisions of this Court insisting upon the finality of grievance resolutions and the presumption of arbitrability as essential to federal labor policy (Petition, 8-14). The Response does not dispute that Respondent presented his estoppel complaint—that he was misled by ALPA's billing notices—under the grievance procedure and that it was held to be without merit (Response, p. 9). Rather, Respondent asserts, for the first time, that ALPA's conduct subverted the arbitral process so as to remove the finality of the grievance resolution under the doctrine of *Hines*.

Hines recognizes a narrow exception to the finality principle which is manifestly inapplicable to this case and was not even presented to, or considered by, the court below. In *Hines*, this Court held that where a union's handling of a contract grievance has been so inadequate as to breach its duty of fair representation, the arbitration process is subverted and the arbitral resoluiton does not bar litigation of the contract breach. Here, unlike *Hines*, Respondent has never even pleaded breach by ALPA of its duty of fair representation; the conduct of which he complains—ALPA's use of an assertedly misleading billing notice—is not even related to the arbitration process. ALPA's billing notice, even if

assumed to be unclear, would in no way cloud Respondent's prospects of obtaining a fair decision through the grievance procedure. Significantly, the Court of Appeals' holding in this case is not based on *Hines* nor is the exception to the exclusivity and finality of the grievance procedure which the Court of Appeals recognizes limited to cases involving subversion of the arbitration process. As such, the exception is directly contrary to the holding of this Court in *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 370 U.S. 254 (1962) that "[a]rbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract. . . ." 370 U.S. at 262. If arbitral finality can be overcome in this case by an assertion of subversion, the same would be true in *Drake Bakeries* and other cases involving breaches of the contract apart from the grievance procedure. It is because the Court of Appeals' decision threatens to open the courts to an as yet undefined plethora of contract grievances, without regard to subversion by the union of the arbitration process, that Petitioner urges that the Petition be granted and the decision below be reversed in order to assure continued effectuation of the federal labor policy favoring final and binding dispute resolution through arbitration.

Finally, as stated in our Supplemental Brief submitted following the grant of certiorari in *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, No. 79-2006, the Court may wish to withhold action on this Petition pending a decision in *Barrentine*. Respondent's argument to the contrary (Response, 11) is transparent. The fact that *Barrentine* involved "an employee's second attempt to have a hearing on the wages due him" whereas this case involves a discharge is immaterial; both cases involve efforts to obtain *de novo* judicial consideration of contract grievances already resolved under contract grievance procedures. If, as held by the Eighth Circuit in *Barrentine*, arbitral finality bars litigation even of a

claim based on the Fair Labor Standards Act, it is a *fortiori* the case that state common law remedies would be barred as well. As suggested in our Supplemental Brief at 3, even if *de novo* judicial consideration is held available for FLSA claims based on the rationale of *Alexander* v. *Gardner-Denver*, 415 U.S. 36 (1974), the Court should still disapprove the decision of the Court of Appeals here as expanding inappropriately upon the circumstances under which *de novo* judicial consideration is available following conclusion of a final and binding grievance procedure.

CONCLUSION

We continue to believe that the Court of Appeals' decision warrants summary reversal *per curiam*. Given the pendency of *Barrentine*, we suggest the Court may wish to withhold disposition of this Petition pending a decision therein.

Respectfully submitted,

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see 769

see 206